Public Prosecutor v Ahmad Saiful Islam bin Mohamad

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–282–11 OF 2021
KAMALUDIN MD SAID, GUNALAN MUNIANDY AND HASHIM HAMZAH JJCA
20 JANUARY 2023

Criminal Procedure — Appeal — Appeal against acquittal — Respondent convicted by magistrate for offence under s 15(1)(a) of Dangerous Drugs Act 1952 — Respondent acquitted and discharged by High Court — Two conflicting Court of Appeal's decision in relation to requirement to collect urine sample in two bottles — Doctrine of stare decisis — Whether Inspector General's Standing Order F103 and the 'Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah Dalam Air Kencing Bil 6/2002' by the Ministry of Health had force of law — Whether failure to collect accused's urine sample in two bottles fatal to prosecution's case — Whether latter decision of Court of Appeal prevailed over earlier decision of Court of Appeal — Dangerous Drugs Act 1952 s 15(1)(a)

The respondent was charged under s 15(1)(a) of the Dangerous Drugs Act 1952 for the offence of consumption or self-administration of drugs. The magistrate had convicted and sentenced the respondent to eight months imprisonment with two years of supervision. The respondent's appeal was allowed by the High Court, hence, the present appeal by the prosecution. Through out the case, the main issue raised was whether the failure of the police to collect the respondent's urine sample in two bottles was fatal to the prosecution's case. The requirement to collect the urine sample in two bottles was based on the Inspector General's Standing Order F103 ('IGSO F103') and the 'Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah Dalam Air Kencing Bil 6/2002' by the Ministry of Health ('KKM Guidelines'). Currently, there were two conflicting Court of Appeal's decisions in relation to whether IGSO F103 and the KKM Guidelines had the force of law. In the earlier case of *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 ('Noor Shariful Rizal'), the Court of Appeal held that IGSO F103 and the KKM Guidelines had the force of law, hence, the failure of the police to collect the accused's sample of urine in two bottles was fatal to the prosecution's case, but the Court of Appeal in the latter case of *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139 ('Rosman Saprey') decided otherwise. The magistrate court had referred to the case *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip Bhagwan Singh') in deciding to follow the Court of Appeal's decision in the case of *Rosman Saprey* premised on the doctrine of stare decisis. The High Court on the other hand opined that it had a choice of which case to follow regardless of which case took precedence

in time. The High Court had opted for the Court of Appeal's decision in the case of *Noor Shariful Rizal*, despite it being an earlier decision on the same issue.

Held, dismissing the appellant's appeal, and affirming the decision of the High Court in discharging and acquitting the respondent:

(1) In terms of judicial hierarchy, the principles governing the Federal Court in *Dalip Bhagwan Singh* were equally applicable to the Court of Appeal in such instances. For the present appeal, when two decisions of the Court of Appeal conflicted on a point of law, the later decision prevailed over the earlier decision. If the subordinate courts could choose either decision of the Court of Appeal, there would be no finality to the issue and no certainty in the law. This would defeat the purpose of judicial precedent and the doctrine of stare decisis. Judicial hierarchy must be observed for the orderly development of legal rules and for the courts and lawyers to regulate their affairs, and to avoid chaos and misapprehensions in the judicial system. The learned magistrate was correct when he followed the decision in *Rosman Saprey* as he was bound by it. Therefore, the failure of the police to collect the respondent's urine sample in two bottles was not fatal to the prosecution's case. On this issue, the court disagreed with the decision of the learned High Court judge (see paras 42–44, 47 & 50).

(2) Even though the court disagreed with the learned High Court judge in relation to the above issue but the court decided to upheld the learned judge's decision in acquitting and discharging the respondent based on the factual matrix of the case. Firstly, there was a major discrepancy in the labelling of the urine sample bottle whereby the label stated that the sample was taken on 5 January 2018 which was not the actual date when the raid was conducted, and the urine sample was taken. The prosecution had to ensure that the urine specimen in the bottle which was sent for analysis was taken from or belonged to the respondent. There must not be any break in the chain of evidence. Secondly, before the learned magistrate, the respondent had raised the issue on the possibility of the urine sample being contaminated during the screening test conducted by the police but there was no clear evidence adduced by the prosecution to address this issue. Based on these findings, the court agreed with the respondent that the respondent's conviction by the learned magistrate was unsafe (see paras 51–56).

[Bahasa Malaysia summary

Responden didakwa di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 atas kesalahan penggunaan atau pengambilan sendiri dadah berbahaya. Majistret telah mensabitkan responden bersalah dan menjatuhkan hukuman penjara lapan bulan dengan dua tahun pengawasan terhadap responden. Rayuan responden dibenarkan oleh Mahkamah Tinggi, justeru, rayuan semasa oleh pihak pendakwaan. Sepanjang kes berlangsung, isu utama yang dibangkitkan

ialah sama ada kegagalan polis mengumpul sampel air kencing responden dalam dua botol memudaratkan kes pendakwaan. Keperluan untuk mengambil sampel air kencing dalam dua botol adalah berdasarkan Perintah Tetap Ketua Polis Negara F103 ('IGSO F103') dan 'Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah Dalam Air Kencing Bil 6/2002' oleh Kementerian Kesihatan ('Garis Panduan KKM'). Pada ketika ini, terdapat dua keputusan Mahkamah Rayuan yang bercanggah berhubung dengan isu sama ada IGSO F103 dan Garis Panduan KKM tersebut mempunyai kuasa undang-undang. Dalam kes terdahulu *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 ('Noor Shariful Rizal'), Mahkamah Rayuan memutuskan bahawa IGSO F103 dan Garis Panduan KKM tersebut mempunyai kuasa undang-undang, justeru, kegagalan polis untuk mengumpul sampel air kencing tertuduh dalam dua botol memudaratkan kes pendakwaan, tetapi Mahkamah Rayuan dalam kes yang berikutnya iaitu *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139 ('Rosman Saprey') memutuskan sebaliknya. Mahkamah majistret telah merujuk kepada kes *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip Bhagwan Singh') dalam membuat keputusan untuk mengikut keputusan Mahkamah Rayuan dalam kes *Rosman Saprey* berdasarkan doktrin stare decisis. Mahkamah Tinggi sebaliknya berpendapat bahawa ia mempunyai pilihan kes mana yang perlu diikuti tanpa mengira kes mana yang diputuskan terlebih dahulu. Mahkamah Tinggi telah memilih keputusan Mahkamah Rayuan dalam kes *Noor Shariful Rizal*, walaupun ia merupakan keputusan yang telah dibuat terlebih dahulu mengenai isu yang sama.

Diputuskan, menolak rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi dalam melepaskan dan membebaskan responden:

(1) Dari segi hierarki kehakiman, prinsip yang mengawal Mahkamah Persekutuan di dalam kes *Dalip Bhagwan Singh* adalah sama terpakai kepada Mahkamah Rayuan dalam keadaan sedemikian. Untuk rayuan semasa, apabila dua keputusan Mahkamah Rayuan bercanggah dalam satu perkara undang-undang, keputusan yang terkemudian mengatasi keputusan terdahulu. Jika mahkamah bawahan boleh memilih salah satu keputusan Mahkamah Rayuan, tidak akan ada kemuktamadan kepada isu tersebut dan tiada kepastian dalam undang-undang. Ini akan menafikan tujuan duluan kehakiman dan doktrin stare decisis. Hierarki kehakiman perlu diperhatikan untuk pembangunan teratur peraturan undang-undang dan untuk mahkamah dan peguam mengawal hal ehwal mereka, dan untuk mengelakkan kekacauan dan salah faham dalam sistem kehakiman. Majistret yang bijaksana adalah betul apabila beliau mengikut keputusan dalam *Rosman Saprey* kerana dia terikat dengannya. Oleh itu, kegagalan polis mengumpul sampel air kencing responden dalam dua botol tidak membawa kemudaratan kepada kes pendakwaan. Mengenai isu ini, mahkamah tidak bersetuju dengan keputusan hakim

Mahkamah Tinggi yang bijaksana (lihat perenggan 42–44, 47 & 50).

(2) Walaupun mahkamah tidak bersetuju dengan hakim Mahkamah Tinggi yang bijaksana berhubung isu di atas tetapi mahkamah memutuskan untuk mengekalkan keputusan hakim yang bijaksana dalam membebaskan dan melepaskan responden berdasarkan matriks fakta kes ini. Pertama, terdapat percanggahan besar dalam pelabelan botol sampel air kencing tersebut di mana label menyatakan bahawa sampel tersebut diambil pada 5 Januari 2018 yang mana ini bukan tarikh sebenar serbuan dijalankan, dan bukan tarikh sampel air kencing tersebut diambil. Pihak pendakwaan perlu memastikan spesimen air kencing di dalam botol yang dihantar untuk dianalisis diambil daripada atau kepunyaan responden. Tidak boleh ada apa-apa pemutusan dalam rantaian keterangan. Kedua, di hadapan majistret yang bijaksana, responden telah membangkitkan isu kemungkinan sampel air kencing tersebut tercemar semasa ujian saringan yang dijalankan oleh polis tetapi tiada keterangan jelas dikemukakan oleh pihak pendakwaan untuk menangani isu ini. Berdasarkan dapatan-dapatan ini, mahkamah bersetuju dengan responden bahawa sabitan responden oleh majistret yang bijaksana adalah tidak selamat (lihat perenggan 51–56).]

Cases referred to

Arulpragasan a/l Sandaraju v Public Prosecutor [1997] 1 MLJ 1; [1996] 4 CLJ 597, FC (refd)

Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (folld)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri [2019] 2 MLJ 433; [2019] 2 CLJ 772, CA (refd)

Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor [2017] 3 MLJ 460; [2017] 4 CLJ 434, CA (refd)

Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan [2018] 4 MLJ 139; [2019] 4 CLJ 767, CA (refd)

Public Prosecutor v Samsul Arifin bin Bakar [2019] MLJU 1953; [2020] 7 CLJ 503, CA (refd)

Tenaga Nasional Bhd v Chew Thai Kay & Anor [2022] 2 MLJ 25; [2022] 2 CLJ 333, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 26, 50(1), (2), 87(1)
Criminal Procedure Code ss 173(f), 180
Dangerous Drugs Act 1952 s 15(1)(a), First Schedule

Drug Dependants (Treatment and Rehabilitation) Act 1983 s 2

Appeal from: *Ahmad Saiful Islam bin Mohamad v Public Prosecutor* [2021] MLJU 2391 (High Court, Kuala Lumpur)

Magaiar Karasi a/p Krishnan (with Khairul Aisamuddin bin Abdul Rahman) (Polis Diraja Malaysia) for the appellant.
Nicholas Kow Eng Chuan (with Emile Ezra bin Md Hussain, Nasar Khan bin Md Hussain, Nasar Khan bin Mirbas Khan and Muaz bin Zafar) (Mazwan Dee Nasar & Shima) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] The respondent in the present case was charged under s 15(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) (Act 234) at the Magistrate Court Kuala Lumpur. The charge against the respondent reads:

> Bahawa kamu pada 05/01/2019 jam lebih kurang 2.05 pagi bertempat di tandas W Club Enterprise Sdn Bhd W Hotel, Tingkat 12, No. 121 Jalan Ampang, di dalam daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur, sebagai orang yang tidak diberi kuasa di bawah undang-undang, didapati kamu memberikan kepada diri sendiri 11-nor-delta-9tetrahydrocannabinol-9-carboxylic acid ke dalam badan kamu sendiri. Oleh yang demikian itu kamu telah melakukan kesalahan di bawah sek: 15(1)(a) Akta Dadah Berbahaya ('ADB') yang boleh dihukum di bawah seksyen dan Akta yang sama.

[2] Upon conviction, the respondent shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years. Immediately after having undergone the punishment imposed upon him in respect thereof, he shall undergo supervision by an officer as defined under s 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283) for a period of not less than two and not more than three years, as may be determined by the court.

[3] The respondent pleaded not guilty to the charge.

THE PROSECUTION'S CASE

[4] During the prosecution's case, six witnesses were called to give evidence. The evidence adduced by the prosecution can be summarised as follows.

[5] On 5 January 2019, at around 12.30am, ASP Hisam bin Abu ('SP1'), Insp Mohd Haszaruddin bin Kamaruzzaman ('SP2') and a team of police officers from the Criminal Investigation Anti-Narcotics Division, Dang Wangi

Police Headquarters, conducted a raid at an entertainment centre known as Pusat Hiburan W Club Enterprise Sdn Bhd, 12th Floor, W Hotel, Jalan Ampang, Kuala Lumpur.

[6] A total of 101 individuals were detained and searched, but nothing incriminating was found. Each of them was made to undergo a preliminary urine test. The respondent was amongst them.

[7] Before the urine samples were collected, SP1 gave a briefing concerning the process of taking urine samples. SP1 instructed all the detainees to give urine samples of not less than 30ml. The respondent was allowed to choose his urine sample bottle. Each bottle was wrapped in a plastic wrapper with five test strips.

[8] The respondent was accompanied to the toilet in the said premise, where he gave his urine sample. After completing the process, the respondent brought the urine sample bottle and placed it on a table. Then, he opened the bottle cover. SP1 then conducted a preliminary screening test by dipping the five test strips into the respondent's urine sample. The respondent's urine sample tested positive for 'THC'. SP1 informed the result of the preliminary test to the respondent and closed the bottle lid in front of him. SP1 then proceeded to label the bottle.

[9] SP1 placed his signature on the label attached to the bottle and the form ('exh P3'). SP1 then placed a label on the bottle with a blue-coloured seal with serial No 0325083, which was placed around the bottle. SP1 lodged a police report regarding the raid ('exh P1').

[10] On the same day, at 7am, SP1 handed over the exhibits and the form to the Investigating Officer, SM Jamil bin Awang ('SP6'). At around 8.15am, SP6 handed over the said bottle and the form to L/Kpl Mohd Faiszul bin Mohd Faudzi ('SP3') for safekeeping. SP3 kept the bottle in a refrigerator in his office before sending them to the Pathology Department, Hospital Kuala Lumpur ('HKL'), for analysis.

[11] On 7 January 2019, acting on the instruction of SP6, SP3 brought the respondent's urine sample together with the form to HKL. SP3 handed the form and the urine sample bottle to Nazri bin Joikul ('SP4'). SP4 received the signed and sealed urine sample bottle from SP3 on the same day at around 9.28am. At around 9.40am, SP4 handed the specimen over to the Science Officer, Suriati bt Adenan ('SP5'), for preliminary screening and confirmation test.

[12] SP5 conducted the preliminary screening test on the same day. The test

was for 'THC', as per the request in the form. The test was conducted using the immunoassay method. SP5 found that the respondent's urine sample contained 'THC'. After the test, SP5 kept the urine sample in a locked refrigerator.

[13] On 10 January 2019, SP5 conducted a confirmation test using the Thin Layer Chromatography (TLC) method and found the specimen to contain '11-nor-delta-9tetrahydrocannabinol-9-carboxylic acid', a dangerous drug listed in the First Schedule to Act 234.

[14] On 13 January 2019, SP5 issued a Confirmation Drug Report on Drugs in Urine Laboratory No 9501090 ('exh P7') and handed the same to the police on 16 January 2019. The respondent's urine sample bottle has been disposed of.

FINDING OF THE MAGISTRATE'S COURT AT THE END OF PROSECUTION'S CASE

[15] At the end of the prosecution's case, the learned magistrate found that the prosecution had successfully proven a prima facie case against the respondent. Hence, the respondent was ordered to enter his defence.

THE DEFENCE'S CASE

[16] The respondent chose to give sworn evidence and called another person as a witness. The gist of the defence's case is as follows.

[17] The respondent gave evidence that he shared a cigarette with a friend named 'Zul Afiq' when the both of them were in a car heading towards W Hotel on the day of the incident.

[18] The respondent testified that Zul Afiq was also charged under s 15(1)(a) of Act 234 and had pleaded guilty to the charge. The respondent said that the police had raided the premises and subjected everyone detained to a urine test. He said that a police officer instructed him to take a transparent empty unlabelled container and proceed into the bathroom to urinate inside the bottle. After he urinated inside the bottle, he gave the bottle to a police officer outside the bathroom. He never witnessed any testing done on the sample. After a while, he was only informed of the outcome of the urine test and was instructed to write his particulars on the label attached to the bottle.

[19] Mohd Irwan bin Osman ('SD2') was the Floor Captain at the club and was on duty the night of the incident. SD2 said that he witnessed the police conducting urine tests that night on customers in the club. SD2 said that the

bottles of urine samples were unmarked. He claimed to have never heard the respondent's name being called up to give his urine sample and that he did not witness any urine tests conducted on the respondent.

FINDING OF THE LEARNED MAGISTRATE AT THE END OF DEFENCE'S CASE

[20] At the close of the defence's case, the learned magistrate found that the respondent had failed to raise a reasonable doubt to the prosecution's case and that the prosecution had successfully proven its case against the respondent beyond reasonable doubt.

[21] As a result, the respondent was found guilty and convicted of the charge. He was sentenced to eight months imprisonment from the date of conviction (24 June 2020) and further ordered to undergo two years of supervision.

THE RESPONDENT'S APPEAL TO THE HIGH COURT

[22] The respondent appealed to the High Court against his conviction and sentence. After hearing both parties to the appeal, the learned High Court judge ('HCJ') allowed the respondent's appeal and set aside his conviction and sentence.

[23] Dissatisfied with the decision of the learned HCJ, the prosecution filed this appeal.

OUR ANALYSIS AND FINDINGS

[24] During the trial, one of the issues raised before the learned magistrate was whether the failure of the police to collect the respondent's urine sample in two bottles was fatal to the prosecution's case.

[25] The argument in support of the requirement to collect the urine sample in two bottles was based on the Inspector General's Standing Order F103 ('IGSO F103') and the 'Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah Dalam Air Kencing Bil 6/2002' by the Ministry of Health ('KKWI Guidelines').

[26] The answer to the above issue depends on whether the IGSO F103 and the KKM Guidelines have any force of law. Currently, two conflicting Court of Appeal decisions have discussed this issue extensively.

[27] In *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor*

[2017] 3 MLJ 460; [2017] 4 CLJ 434 (which was decided on 22 February 2017), the Court of Appeal decided that the IGSO F103 and the KKM Guidelines have the force of law. Consequently, the failure of the police to collect the accused's urine sample in two bottles was fatal to the prosecution's case.

[28] In *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139; [2019] 4 CLJ 767 (which was decided on 23 April 2018), the Court of Appeal departed from its earlier decision in *Noor Shariful Rizal*. In this case, it was decided that the IGSO F103 and the KKM Guidelines are mere administrative guidelines and have no force of law. As a result, it was held that the failure of the police to collect the accused's urine sample in two bottles was not fatal to the prosecution's case.

[29] When confronted with the two Court of Appeal's decisions above, the learned magistrate followed *Rosman Saprey*, the latest decision of the Court of Appeal, citing the doctrine of *stare decisis* as his reason for doing so. To be exact, the learned magistrate cited the following passage in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 where the Federal Court held:

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

[30] When the matter came up on appeal before the High Court, the learned HCJ was of the opinion that he had a choice of which case to follow regardless of which case took precedence in time. The learned HCJ decided to follow *Noor Shariful Rizal*, despite it being an earlier decision on the same issue. He also cited *Dalip Bhagwan Singh* and referred to the following passage:

> *In this connection, it is interesting to refer to Cassell & Co v Broome* [1972] AC 1027 at p 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by Court of Appeal for itself but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

[31] Before us, the learned deputy public prosecutor ('DPP') for the appellant submitted that the learned HCJ had erred in doing so. We agree with the learned DPP for the following reasons.

[32] In *Dalip Bhagwan Singh*, the applicant (accused) was initially charged in the Sessions Court, Kuala Lumpur and was acquitted and discharged on

31 January 1985 at the close of the prosecution case without his defence being called. The public prosecutor then appealed against the order of acquittal to the High Court. The High Court then set aside the order of acquittal and ordered a retrial before a different sessions court judge. The retrial took place. At the close of the case for the prosecution, the applicant was again acquitted and discharged for the second time without his defence being called. The public prosecutor appealed to the High Court, and again the appeal was allowed. The order of acquittal was again set aside. The applicant was ordered to enter his defence.

[33] Only this time, the applicant applied for leave to refer certain questions of law to the then Supreme Court. Three of the questions were allowed, all of which relate to the issue of the correct burden of proof at the end of the prosecution's case, whether proof beyond reasonable doubt or proof of prima facie case. This was due to the conflicting Federal Court and Supreme Court decisions on the above issue at that time, before the 1997 amendment to ss 173(f) and 180 of the Criminal Procedure Code (by way of the Criminal Procedure Code (Amendment) Act 1997) came into force.

[34] At the time of hearing the applicant's appeal, the Federal Court decision in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1996] 4 CLJ 597 was the latest decision concerning the above issue. In *Arulpragasan*, the Federal Court held that the standard of proof required of the prosecution at the close of its case is beyond reasonable doubt. The Federal Court in *Dalip Bhagwan Singh* decided that since *Arulpragasan* was the latest Federal Court decision, the lower courts were bound to follow it for criminal offences before the 1997 amendment.

[35] The relevant part of the Supreme Court's decision in *Dalip Bhagwan Singh* on the doctrine of stare decisis or judicial precedent is reproduced below:

> The doctrine of stare decisis or the rule of judicial precedent dictates that *a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.*
>
> *The said exceptions are as decided in Young v Bristol Aeroplane Co. Ltd* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956, vide its s 3.
>
> To recap, the relevant ratio decidendi in Young v. Bristol Aeroplane's case is that *there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given perincuriam need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow*

irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in *Morelle v Wakeling* [1955] 2 QB 379, 406 as a 'decision given in ignorance orforgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong.' It should be borne in mind that the year of Morelle's case is 1955 whereas s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

In this connection, *it is interesting to refer to Casseil & Co v Broome* [1972] AC 1027, 1054. It was held *that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.*

The rule of *judicial precedent in relation to the House of Lords was stated in London Tramways v London County Council* [1898] AC 375 *that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.*

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the 'Practice Statement (Judicial Precedent) 1966' which is set out below:

> LORD GARDINER LC: Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases.
>
> It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordship nevertheless recognise that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

> They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the need especially for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly.

In Malaysia, the Federal Court and its forerunner ie, Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so, see the above-mentioned Federal Court's cases on the question of burden of proof at the close of prosecution case.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court, should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it can not be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

In this connection, the question of a 'full court' or a panel of Federal Court comprising more than three members as compared with the ordinarily constituted quorum of three members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary quorum is the same by necessary implication. A full court or a panel larger than the ordinary quorum is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

We are now in a position to deal with 'Question 1' posed to us and as set out above and our answer is in the negative.

[36] We believe that the principles that can be gleaned from the passage above can be summarised as follows:

(a) a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure;

(b) the Court of Appeal is bound by its own decisions except:

(i) if the decision was given per incuriam;

(ii) when faced with a conflict of past decisions, it may choose which to follow irrespective of the date; and

(iii) when the decision is expressly or by necessary implication, overruled by the Federal Court;

(c) the courts below the Court of Appeal could not rely on the per incuriam rule applied by Court of Appeal for itself, but could choose between the two conflicting decisions; and

(d) when two decisions of the Federal Court conflict, on a point of law, the later decision prevails over the earlier decision.

[37] However, for criminal appeals originating from the subordinate courts, ie, the Magistrate's Court or the Sessions Court, we are of the view that ss 26, 50(1), 50(2) and 87(1) of the Courts of Judicature Act 1964 (Revised 1972) (Act 91) must also be considered.

[38] Section 26 of Act 91 states that:

> The *appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts* according to any law for the time being in force within the territorial jurisdiction of the High Court.

[39] Section 50(1) and (2) of Act 91 reads:

> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, *the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —*
>
> (a) *in the exercise of its original jurisdiction;* and
>
> (b) *in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.*
>
> (2) *An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.*

[40] In short, the Court of Appeal has the jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction or its appellate or revisionary jurisdiction in any criminal matters decided by the subordinate courts.

[41] On the other hand, it can be seen that the Federal Court has no jurisdiction to determine any appeals originating from any criminal matters decided by the subordinate courts. Section 87(1) of Act 91 reads:

> *The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction* subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.

[42] In short, for criminal matters decided by the subordinate courts, the Court of Appeal is the highest court to determine any appeals arising thereof. In terms of judicial hierarchy, we hold that the principles governing the Federal Court in *Dalip Bhagwan Singh* are equally applicable to the Court of Appeal in such instances.

[43] For this appeal, when two decisions of the Court of Appeal conflict on a point of law, the later decision prevails over the earlier decision. If the subordinate courts can choose either decision of the Court of Appeal, there will be no finality to the issue and no certainty in the law. This would defeat the purpose of judicial precedent and stare decisis.

[44] Judicial hierarchy must be observed for the orderly development of legal rules and for the courts and lawyers to regulate their affairs, and to avoid chaos and misapprehensions in the judicial system.

[45] In the words of Steve Shim CJ (Sabah & Sarawak) in the Federal Court case of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577:

> [2] ... it is axiomatic to state that *the doctrine of stare decisis has become the cornerstone of the common law system practised in this country.* It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 277; [1980] 1 LNS 58 Mr Justice Chang Min Tat had occasion to restate the doctrine in words which are poignantly clear when he said: -
>
> > It is necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.
>
> [3] *Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.* This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnapan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 wherein Gopal Sri Ram JCA said:

> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

[46] In the Federal Court case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577, Mohd Ghazalf Yusoff FCJ (as he then was) held:

> [53] *The common law tradition is built on the doctrine of stare decisis which directs a court to look to past decisions for guidance on how to decide a case before it.* This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute. *The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law.* Reliance upon precedent contributes predictability to the law *because it provides notice of what a person's rights and obligations are in particular circumstances.* It also means that lawyers can give legal advice to clients based on settled rules of law. There is certainty in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law.
>
> [54] This court create precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases ...

[47] Based on the reasons above, we agree with the learned DPP that the learned magistrate was correct when he followed the decision in *Rosman Saprey* as he was bound by it.

[48] On our part, we see no reason to depart from *Rosman Saprey*. We are guided by the Federal Court case of *Tenaga Nasional Bhd v Chew Thai Kay & Anor* [2022] 2 MLJ 25; [2022] 2 CLJ 333 in which His Lordship Azahar Mohamed CJ (Malaya) in delivering the judgment of the court held as follows:

> [29] As can be seen, our discussion thus far is sufficient to dispose of questions 1 and 2. Nonetheless, as an alternative argument, learned counsel for TNB made a bold submission. He cited the case of *Merck Sharp & Dohme Group & Anor v Hovid Bhd* [2019] 12 MLJ 66; [2019] 9 CLJ 1 (FC) where it was observed that the Federal Court may depart from its previous ruling when the previous decision is 'wrong, uncertain, unjust, outmoded or obsolete'. It was much pressed in argument by learned counsel that we should revisit our decision in *Mayaria* (FC) implying that our judgment in *Mayaria* (FC) was wrong. There is much that is unacceptable in his arguments.
>
> [30] *We will say at once that overturning our own precedent is a serious matter. This court must always respect its own precedents. The rule of legal precedence must he followed in the interest of certainty, Great sanctity must be attached to the finality of our*

judgment. This is not to say that this court should never depart from an earlier decision. We do not blindly honour stare decisis. While it is true that we can overturn our own precedent in exceptional cases where it is really necessary, as an apex court, we need to be cautious about departing from our own earlier decision especially in a case that concerns the interpretation of a legislative provision, lest we lose the trust of public by persistent shifts of laws. The law is about stability, predictability and certainty that allow the public and the business community to plan and organise their lives based on the previous precedent A degree of certainty, consistency and predictability in the law is one of the foundations upon which our justice system operates. Therefore, we remind ourselves that it is of utmost importance this court adheres to its past rulings. In Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577 (FC), Arifin Zakaria CJ in delivering the judgment of this court reminded us at para 35:

> [35]... *It is of supreme importance that people may know with certainty what the law is, and this can he attained by a loyal adherence to the doctrine of stare decisis.* Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before.

[31] In the later part of his judgment His Lordship added at para 50:

> [50]... I would think that this court must follow its own proclamation of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country.

[32] This brings us to the recent decision of this court in *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153 where we said:

> [83] Indeed, the doctrine of stare decisis dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. *However, there are exceptional circumstances that allow them to depart from the earlier decision, but such power must be used sparingly.*

[33] In another part of the judgment we further said at para 79 (CLJ); para 13 (MLJ):

> [79] ... Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty by departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case. It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts.

[34] While still on the subject of the importance of obedience of judicial precedence, the point is aptly put by Darryl Goon Siew Chye JCA, to which we respectfully agree, in delivering the latest judgment of the Court of Appeal on this subject matter in the case of *Kejuruteraan Bintai Kindenko* as follows at para 72:

> [72] ... While judges may no doubt sincerely have differences in views, there is also public interest to consider It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because

of a confusing melee of conflicting legal decisions by the courts. A

[49] In addition, *Rosman Saprey* has been reaffirmed by *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433; [2019] 2 CLJ 772 (CA) and *Public Prosecutor v Samsul Arifin bin Bakar* [2019] MLJU 1953; [2020] 7 CLJ 503 (CA). B

[50] It is therefore our position that the failure of the police to collect the respondent's urine sample in two bottles is not fatal to the prosecution's case. On this issue, we disagree with the decision of the learned HCJ. C

[51] Even though we disagree with the learned HCJ on the above issue, we upheld the learned HCJ's decision in acquitting and discharging the respondent based on the factual matrix of this case. D

[52] Firstly, as correctly pointed out by the learned counsel for the respondent, there was a major discrepancy in the labelling of the urine sample bottle. The label on the bottle stated that the sample was taken on 5 January 2018 which was not the actual date when the raid was conducted and the urine sample was taken, according to the prosecution's witnesses. E

[53] SP1 admitted to the discrepancy in the date on the urine sample bottle and explained that it was a mere human error. If this was true, there should have been some effort on the part of SP1 to amend, correct or revise the discrepancy on the urine sample bottle before sending it for analysis, but there was none in the present case. F

[54] To our minds, the prosecution has to ensure that the urine specimen in the bottle which was sent to SP5 for analysis was actually taken from or belonged to the respondent. In the absence of any DNA evidence, the prosecution must ensure that there is no mistake in the labelling of the bottle which would otherwise affect the identity and credibility of the respondent's urine sample. There must not be any break in the chain of evidence. Anything short would definitely raise serious doubts as to whether the urine sample was actually taken on the day in question and whether the urine sample actually belonged to the respondent. G H

[55] Secondly, the learned counsel for the respondent during the trial before the learned magistrate raised the issue on the possibility of the urine sample being contaminated during the screening test conducted by the police. There was no clear evidence adduced by the prosecution to address this issue. Even SP5 in her evidence during cross-examination stated that she was not sure whether the respondent's urine sample was contaminated prior to the urine I

specimen being delivered to her for analysis. There was also no clarification sought by the learned DPP on this issue during re-examination.

[56] Based on the above, we agree with the learned counsel for the respondent that the respondent's conviction by the learned magistrate was unsafe.

CONCLUSION

[57] In conclusion, we found merit in the submission by the learned DPP for the appellant. However, we also found merit in the submission of the learned counsel for the respondent that it was not safe to convict the respondent on the said charge based on the surrounding facts of this case.

[58] Therefore, we dismissed the appellant's appeal and affirmed the decision of the High Court in discharging and acquitting the respondent of the said charge against him.

Appellant's appeal dismissed; decision of High Court in discharging and acquitting respondent affirmed.

Reported by Dzulqarnain Ab Fatar